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SERVICE DATE - MARCH 2, 2001

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

STB Docket No. AB-402 (Sub-No. 8X)

FOX VALLEY & WESTERN LTD.--ABANDONMENT
EXEMPTION--IN BROWN AND OUTAGAMIE COUNTIES, WI

Decided: March 1, 2001

By petition filed on November 13, 2000,¹ Fox Valley & Western Ltd. (FVW) seeks an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10903 to abandon a 34.2-mile line of railroad extending from milepost 4.78 west of Green Bay to milepost 38.98 in New London, in Brown and Outagamie Counties, WI. The Wisconsin Department of Transportation (WisDOT),² on behalf of the Wisconsin Department of Natural Resources (WisDNR),³ requests issuance of a notice of interim trail use (NITU) under the National Trails System Act, 16 U.S.C. 1247(d). We will grant the exemption subject to environmental, trail use, and standard employee protective conditions.

BACKGROUND

FVW is a Class II rail carrier that operates approximately 500 miles of rail lines in the State of Wisconsin. It is a wholly owned subsidiary of Wisconsin Central Transportation Corporation.

FVW identifies seven shippers⁴ on the line and states that it served each shipper with a copy of the petition. Only one of these shippers, Seymour Lumber (Seymour), has indicated opposition to the proposed abandonment. In a letter dated December 26, 2000, Seymour states that the rail line is integral to the success of its business and that there is no reasonable alternative

¹ Notice of the filing was served and published in the Federal Register on December 1, 2000 (65 FR 75334).

² WisDOT is the designated state agency for rail matters in the State of Wisconsin. It has the statutory right to acquire for present or future transportation, recreational, or scenic purposes any property used in operating a railroad that is abandoned in Wisconsin.

³ WisDNR is the lead state agency responsible for designating, acquiring, developing, and maintaining a system of state trails for public use.

⁴ An eighth shipper, Veronica Foods, is no longer in business.

for shipment of its building materials, which includes lumber. According to Seymour, significant increases in transportation costs will result from using alternative means to supply the building materials. FVW replied, stating that the traffic tendered by Seymour, 11 cars in 1998, 7 cars in 1999, and 14 cars as of November 2000, is insignificant. FVW also states that the items shipped, lumber products and oriented strand board, are exempt commodities, for which there is truck competition.

The remaining six shippers have not indicated any objection to the proposed abandonment. According to FVW, three of these shippers are active customers. Lakeside Foods, Inc. (Lakeside), shipped 29 cars in 1998, 7 cars in 1999, and 8 cars as of October 25, 2000. Agro Distribution (Agro) took over its site from another rail-served customer, Terra International (Terra), in 1999. Terra shipped 107 cars in 1998 and 83 cars in 1999; Agro shipped 34 cars in 1999 and 39 cars as of October 25, 2000. Scenic Valley Co-op (Scenic Valley) shipped 93 cars in 1998,⁵ 202 cars in 1999, and 30 cars as of October 25, 2000. FVW states that Scenic Valley is now receiving service from a nearby Wisconsin Central Ltd. (WCL)⁶ line.

The other three shippers had no traffic on the line in 1999 through October 25, 2000. The Scoular Company (Scoular) shipped 86 cars in 1998. FVW states that if Scoular desires service, it could receive it, as Scenic Valley does, on WCL's line. Also in 1998, Shiocton Lumber (Shiocton) shipped 4 cars and Continental Grain, now Chicago & Illinois River Marketing, LLC (CIRM), shipped 18 cars.

FVW states that all overhead traffic can be rerouted to other lines. After abandonment of the line, FVW intends to use salvageable track and materials for upgrading and maintaining its other rail lines.

DISCUSSION AND CONCLUSIONS

Before we discuss the merits of this proceeding, some comments regarding the quality of the evidence presented are in order. While we recognize that this is not an abandonment application necessitating a comprehensive presentation of traffic and revenue (or loss) information, petitioner should be aware that it still must present a prima facie case under the criteria for approval of an exemption as discussed below. This is especially true when, as is the case here, there is opposition to the petition. FVW has minimally met this threshold; moreover, the protesting shipper, Seymour, has also failed to provide more than a general statement that it will incur increased transportation costs if it must use alternative transportation. Consistent with

⁵ The 1998 total includes the traffic of another company, New Grain, which has since merged into Scenic Valley.

⁶ WCL is an affiliate of FVW.

Board precedent, we reiterate in the strongest terms that a party choosing to file an exemption in lieu of an abandonment application must present sufficient evidence to make its case and, similarly, that parties in opposition also should make detailed, well-documented presentations.

Under 49 U.S.C. 10903, a rail line may not be abandoned without our prior approval. Under 49 U.S.C. 10502, however, we must exempt a transaction or service from regulation when we find that: (1) continued regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101; and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not necessary to protect shippers from the abuse of market power.

Detailed scrutiny under 49 U.S.C. 10903 is not necessary to carry out the rail transportation policy. By minimizing the administrative expense of the application process, an exemption will reduce regulatory barriers to exit [49 U.S.C. 10101(7)]. An exemption will also foster sound economic conditions and encourage efficient management by permitting FVW to abandon the line and use its assets more productively elsewhere on its system [49 U.S.C. 10101(5) and (9)]. Other aspects of the rail transportation policy will not be affected adversely.

Regulation of the transaction is not necessary to protect shippers from the abuse of market power because the shippers on the line either do not object or have other available transportation alternatives. Nevertheless, to ensure that these shippers are informed of our decision, we will require FVW to serve a copy of this decision on them within 5 days of the service date and certify to us that it has done so. Given our market power finding, we need not determine whether the proposed transaction is limited in scope.

Under 49 U.S.C. 10502(g), we may not use our exemption authority to relieve a carrier of its statutory obligation to protect the interests of its employees. Accordingly, as a condition to granting this exemption, we will impose the employee protective conditions in Oregon Short Line R. Co.--Abandonment--Goshen, 360 I.C.C. 91 (1979).

FVW has submitted an environmental report with its petition and has notified the appropriate Federal, state, and local agencies of the opportunity to submit information concerning the energy and environmental impacts of the proposed abandonment. See 49 CFR 1105.11. Our Section of Environmental Analysis (SEA) has examined the environmental report, verified its data, and analyzed the probable effects of the proposed action on the quality of the human environment. SEA served an environmental assessment (EA) on January 12, 2001, and requested comments.

In the EA, SEA recommends that conditions be imposed on any decision granting abandonment authority to alleviate the concerns of the U.S. Department of Commerce, National Geodetic Survey (NGS), U.S. Environmental Protection Agency (EPA), U.S. Army Corps of Engineers (Army Corps), WisDNR, WisDOT and the Wisconsin Counties of Brown and Outagamie. NGS has not completed its review of the proposed abandonment. Therefore, the first condition recommended by SEA would require FVW to consult with NGS prior to

undertaking salvage operations. If salvage operations are expected to destroy or disturb any geodetic station markers, FVW shall notify NGS not less than 90 days prior to commencement of such operations. EPA has also not completed its review of the proposed abandonment.

Therefore, the second condition recommended by SEA would require FVW to consult with EPA Region 5 regarding the identification and remediation of all hazardous waste disposal/discharge sites and to secure all necessary permits prior to initiation of remediation and disposal activities. The third condition recommended by SEA addresses the Army Corps' concern that the structures crossing Wolf River be maintained in compliance with permits and would require FVW to consult with the Army Corps prior to initiation of salvage or disposal activities to determine if the proposed abandonment is consistent with applicable Federal, state, and local water quality standards, and if permits are required under section 404 of the Clean Water Act. The fourth condition recommended by SEA addresses WisDNR's concerns regarding hazardous waste along the right-of-way and would require FVW to consult with WisDNR regarding the identification and remediation of all hazardous waste disposal/discharge sites and to secure all necessary permits prior to initiation of remediation and disposal activities. The fifth condition recommended by SEA would require FVW to prepare a track salvage work plan, in compliance with WisDOT's Abandoned Railroad Line Salvage and Clean-up Policy/Standards/Procedures (WisDOT Procedures), that addresses the potential impact to surface water quality and wetlands resulting from abandonment activities. The recommended condition would also require FVW to consult with WisDNR regarding the work plan guidelines prior to consummation of abandonment activities. The sixth condition recommended by SEA addresses WisDNR's further concern that the rail line passes through Mack State Wildlife Area and would require FVW, prior to conducting any salvage activities within the boundaries of the wildlife area, to consult with WisDNR and to take all steps necessary to keep such salvage activities to a minimum. The seventh condition recommended by SEA addresses WisDOT's concerns and also would require FVW to prepare a track salvage work plan in compliance with WisDOT Procedures. This work plan would require FVW to: (a) contact the appropriate maintaining authority to coordinate work efforts; (b) remove all rail, ties, and ballast from state at-grade crossings; (c) obtain a permit from the district maintenance section to perform work on the roadway right-of-way; (d) take appropriate measures to handle traffic while rail line materials are being removed from at-grade crossings; (e) restore the roadway at-grade crossings in like kind; and (f) take all measures necessary to protect surveying benchmarks, monumentation, and mapping information for the rail line. The recommended condition would also require FVW to consult with WisDOT regarding the work plan guidelines prior to consummation of abandonment activities. The eighth and final condition recommended by SEA would require FVW to consult with the Wisconsin Counties of Brown and Outagamie prior to initiation of any salvage activities in order to address any concerns the Counties may have.

In response to the EA, SEA received comments from the Oneida Tribe's Environmental Quality Department (OEQD) and the Oneida Cultural Heritage Department (OCHD). The OEQD is concerned about the possible occurrence of sensitive biological species (wood turtle, reidside dace, brook trout) in or near the rail line as it crosses Trout Creek, Oneida Creek, and Duck Creek within the Oneida Reservation and the need to protect these species and the water

resources during any rail line salvage activities. SEA, therefore, recommends that a condition be imposed on any decision granting abandonment authority that, prior to any salvage activities, FVW shall consult with the OEQD regarding the protection of biological and water resources. The OCHD is concerned about impacts from the abandonment and salvage activities of the rail line to twenty-one identified prehistoric and historic sites. Accordingly, SEA recommends that FVW shall retain its interest in and take no steps to alter the integrity of the entire rail line until completion of the section 106 process of the National Historic Preservation Act, 16 U.S.C. 470f.

We will impose the conditions recommended by SEA. Based on SEA's recommendation, we conclude that the proposed abandonment, if implemented as conditioned, will not significantly affect either the quality of the human environment or the conservation of energy resources. Although SEA has indicated in the EA that the right-of-way may be suitable for public use under 49 U.S.C. 10905, no one has sought a public use condition, and none will be imposed.⁷

As noted, WisDOT, on behalf of WisDNR, requests issuance of a NITU for the right-of-way involved in this proceeding. Acquisition of the rail corridor would allow WisDNR to use the right-of-way for trail purposes. WisDNR has submitted a statement of willingness to assume financial responsibility for the right-of-way, and acknowledged that use of the right-of-way is subject to possible future reconstruction and reactivation for rail service as required under 49 CFR 1152.29. FVW has indicated that it is willing to negotiate with WisDNR for interim trail use. Because WisDNR's request complies with the requirements of 49 CFR 1152.29 and FVW is willing to enter into negotiations, we will issue a NITU for the line. The parties may negotiate an agreement during the 180-day period prescribed below. If an agreement is reached, no further Board action is necessary. If no agreement is reached within 180 days, FVW may fully abandon the line. See 49 CFR 1152.29(d)(1). Use of the right-of-way for trail purposes is subject to restoration for railroad purposes.

The parties should note that operation of the trail use procedures could be delayed, or even foreclosed, by the financial assistance process under 49 U.S.C. 10904. As stated in Rail Abandonments--Use of Rights-of-Way as Trails, 2 I.C.C.2d 591, 608 (1986), OFAs to acquire rail lines for continued rail service or to subsidize rail operations take priority over interim trail use/rail banking. Accordingly, if an OFA is timely filed under 49 CFR 1152.27(c)(1), the effective date of this decision and notice will be postponed beyond the effective date indicated here. See 49 CFR 1152.27(e)(2). In addition, the effective date may be further postponed at later stages in the OFA process. See 49 CFR 1152.27(f). Finally, if the line is sold under the OFA procedures, the petition for abandonment exemption will be dismissed and trail use precluded. Alternatively, if a sale under the OFA procedures does not occur, the trail use process may proceed.

⁷ Public use requests were due no later than 20 days after publication of the notice in the Federal Register, or by December 21, 2000.

It is ordered:

1. Under 49 U.S.C. 10502, we exempt from the prior approval requirements of 49 U.S.C. 10903, the abandonment by FVW of the above-described line, subject to the employee protective conditions in Oregon Short Line R. Co.--Abandonment--Goshen, 360 I.C.C. 91 (1979), and the conditions that: (1) if salvage operations are expected to destroy or disturb any geodetic station markers, FVW shall notify NGS not less than 90 days prior to commencement of such operations; (2) FVW shall consult with EPA Region 5 regarding the identification and remediation of all hazardous waste disposal/discharge sites and secure all necessary permits prior to initiation of remediation and disposal activities; (3) FVW shall consult with the Army Corps prior to initiation of salvage or disposal activities to determine if the proposed abandonment is consistent with applicable Federal, state, and local water quality standards, and if permits are required under section 404 of the Clean Water Act; (4) FVW shall consult with WisDNR regarding the identification and remediation of all hazardous waste disposal/discharge sites and secure all necessary permits prior to initiation of remediation and disposal activities; (5) FVW shall prepare a track salvage work plan in compliance with WisDOT Procedures that addresses the potential impact to surface water quality and wetlands resulting from abandonment activities and consult with WisDNR regarding the work plan guidelines prior to consummation of abandonment activities; (6) FVW shall, prior to any salvage activities, consult with WisDNR and take all steps necessary to keep salvage activities to a minimum within the boundaries of the Mack State Wildlife Area; (7) FVW shall prepare a track salvage work plan in compliance with WisDOT Procedures that requires FVW to (a) contact the appropriate maintaining authority to coordinate work efforts, (b) remove all rail, ties, and ballast from state at-grade crossings, (c) obtain a permit from the district maintenance section to perform work on the roadway right-of-way, (d) take appropriate measures to handle traffic while rail line materials are being removed from the at-grade crossings, (e) restore the roadway at-grade crossings in like kind, (f) take all measures necessary to protect surveying benchmarks, monumentation, and mapping information for the rail line and (g) consult with WisDOT regarding the work plan guidelines prior to consummation of abandonment activities; (8) FVW shall consult with the Wisconsin Counties of Brown and Outagamie prior to initiation of any salvage activities in order to address any concerns the Counties may have; (9) FVW shall consult with the OEQD regarding the protection of biological and water resources; (10) FVW shall retain its interest in and take no steps to alter the integrity of the entire rail line until completion of the section 106 process of the National Historic Preservation Act, 16 U.S.C. 470f.; and (11) FVW shall comply with the interim trail use/rail banking procedures set forth below.

2. FVW is directed to serve a copy of this decision on Seymour, Lakeside, Agro, Scenic Valley, Scoular, Shiocton, and CIRM within 5 days after the service date of this decision and to certify to the Board that it has done so.

3. If an interim trail use/rail banking agreement is reached for the line, it must require the trail user to assume, for the term of the agreement, full responsibility for management of, any legal liability arising out of the transfer or use of (unless the user is immune from liability, in

which case it need only indemnify the railroad against any potential liability), and for the payment of any and all taxes that may be levied or assessed against, the right-of-way.

4. Interim trail use/rail banking is subject to the future restoration of rail service and to the user's continuing to meet the financial obligations for the right-of-way.

5. If interim trail use is implemented and subsequently the user intends to terminate trail use, it must send the Board a copy of this decision and notice and request that it be vacated on a specified date.

6. If an agreement for interim trail use/rail banking is reached by the 180th day after service of this decision and notice, interim trail use may be implemented. If no agreement is reached by that time, FVW may fully abandon the line, provided the conditions imposed above are met.

7. An OFA under 49 CFR 1152.27(c)(1) to allow rail service to continue must be received by the railroad and the Board by March 12, 2001, subject to time extensions authorized under 49 CFR 1152.27(c)(1)(i)(C). The offeror must comply with 49 U.S.C. 10904 and 49 CFR 1152.27(c)(1). Each OFA must be accompanied by the filing fee, which currently is set at \$1,000. See 49 CFR 1002.2(f)(25).

8. OFAs and related correspondence to the Board must refer to this proceeding. The following notation must be typed in bold face on the lower left-hand corner of the envelope: **"Office of Proceedings, AB-OFA."**

9. Provided no OFA has been received, this exemption will be effective April 1, 2001. Petitions to stay must be filed by March 19, 2001, and petitions to reopen must be filed by March 27, 2001.

10. Pursuant to the provisions of 49 CFR 1152.29(e)(2), FVW shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the line. If consummation has not been effected by FVW's filing of a notice of consummation by March 2, 2002, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire. If a legal or regulatory barrier to consummation exists at the end of the 1-year period, the notice of consummation must be filed no later than 60 days after satisfaction, expiration, or removal of the legal or regulatory barrier.

By the Board, Chairman Morgan, Vice Chairman Clyburn, and Commissioner Burkes.

Vernon A. Williams
Secretary